

THE HON'BLE SRI JUSTICE B.SUDERSHAN REDDY
AND
THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

WRIT PETITION NO.9991 OF 2005

JUDGMENT: (per Sri Ramesh Ranganathan, J)

DATE : 12-8-2005

Between:

N.Ramakrishna Petitioner

And

The Commissioner of Customs and Central Excise,

Guntur and another Respondents

Orders passed by the Customs, Excise and Service Tax Appellate Tribunal in C/appeal No.374/2003, dated 30.09.2004 and the consequential final order No. 1459 of 2004, dated 03.09.2004 are impugned in the writ petition as being contrary to the provisions of the Customs Act and in violation of Article 14 and 19 of the Constitution of India.

The facts, to the extent necessary for the purpose of this writ petition, are that the petitioner is the Managing Director of M/s. Eastern Granites Limited, a Company set up as a 100% Export Oriented Unit at Ketanakonda, Krishna District for manufacture and export of granite panels/slabs, tiles and granite monuments. Among the concessions given to the company, as a 100% Export Oriented Unit, was waiver of import duty on capital machinery imported for the purpose of setting up of the export oriented unit and the goods imported for the purpose of utilizing the same for manufacture of goods which would subsequently be exported out of India. The company availed this facility of waiver of duty under the Customs Act. Under the scheme, for availing the benefits of duty free import of goods, issued in Notification No.13/81-CUS, dated 09.02.1981 under the Customs Act and Notification No.123/81-CE dated 02.06.1981 and 57/94-CE dated 01.03.1994 under the Central Excise Act, units availing the facilities and concessions granted under these schemes were required to execute agreements with the Development Commissioner, Ministry of Commerce, whereunder the units were required to undertake export of the entire production subject to the right to sell upto 5% of the production within India. Under the said agreement, the Development Commissioner was entitled to levy a fine in the event of failure on the part of the unit in performing its part of the agreement. The company is said to have entered into an agreement with the Development Commissioner, Visakhapatnam on 05.01.1993, whereunder it was required to export its entire production and failure to do so was to result in the company being held liable for payment of the entire Customs and Central Excise duties and for liquidated damages as quantified by the Development Commissioner.

The company, which claims to have commenced production in 1994-95, to have become sick and to have suspended its operations by 1998-99, was issued show cause notice dated 16.03.2001 asking it to show cause as to why customs duty payable on the import of goods should not be collected and why central excise duty payable on the capital goods which were procured without payment of Central Excise duty should also not be collected. Both the company and the petitioner submitted their reply thereto, vide letter dated 07.03.2002, and were also given a personal hearing on 19.06.2003. The defence of the company was that stoppage of commercial production was due to reasons beyond its control, that the company had registered itself as a sick industrial undertaking before the Board of Industrial and Financial Reconstruction, that the Development Commissioner had imposed a penalty of Rs.20,000/- on the company for its failure to carry out export obligation and therefore, the 1st respondent Commissioner of Customs and Central Excise had no jurisdiction to adjudicate the matter.

However, order dated 29/30.07.2003 was passed, whereby the 1st respondent confirmed payment of customs duty Rs.6,95,52,486/- in terms of Notification 13/81-CUS and Central Excise Duty at Rs.13,18,276/- in terms of Notification No.123/81, 57/94 and 1/95 besides demanding interest. The 1st respondent also confiscated the imported goods valued at Rs.7,53,99,080/- and gave an option to the company to redeem the goods on payment of fine of Rs.6,95,00,000/-. Penalty of Rs.6,00,00,000/- was imposed on the company under Rule 173Q of the Central Excise Rules. Penalty of Rs.1.75 Crores was imposed on the petitioner under Section 112 of the Customs Act.

The 1st respondent, in its order dated 29/30.07.2003, held that the export obligation achieved by the unit was dismal, that despite being conscious of not achieving export obligations for the years 1994, 1995 and 1996, they continued to import goods in the subsequent years 1995, 1996 and 1997, that the petitioner as Managing Director of the unit and incharge of the affairs of the unit was responsible for these acts and that he had consciously and deliberately dealt with the import, receipt, storage of the impugned goods which he knew or had reason to believe, was liable for confiscation. The 1st respondent held that the petitioner was liable for penalty under Section 112 of Customs Act. While confirming the demand of customs duty and Central Excise and ordering payment of interest, confiscation of goods and

penalty on the company, the 1st respondent also imposed penalty of Rs.1.75 Crores on the petitioner herein under Section 112 of the Customs Act.

Aggrieved by the order of the 1st respondent dated 29/30.07.2003, the petitioner filed an appeal before the 2nd respondent. Along with the appeal, the petitioner sought for stay of operation of the order of the 2nd respondent and for waiver of pre-deposit of duties and redemption of fine imposed under the Central Excise and Customs Acts. The 2nd respondent, vide order dated 30.4.2004, while holding that the company had not fulfilled its export obligations and was required to pre-deposit the duty amounts of Rs.6,95,52,486/- and Rs.13,18,276/- within a period of four months from the date of the order, held that on such pre-deposit being made, the penalty imposed on the company and its Managing Director stood waived and recovery stayed. It was made clear that in case the said amounts were not deposited, by the appellants, the appeals were liable to be dismissed under Section 129E of the Customs Act.

The 2nd respondent, in its order dated 3-9-2004, while taking note of the fact that by stay order dated 27-4-2004, the appellants were directed to pre-deposit the duty demanded of Rs.6,95,52,486/- and Rs.13,18,276/- and to report compliance, held that since the appellants had not complied with the terms of the stay order the appeals were dismissed under Section 129E of the Customs Act.

Section 112 of the Customs Act reads thus:

Penalty for improper importation of goods, etc.

Any person,

- a. who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or
- b. who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111,

shall be liable,

- i. in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty (not exceeding the value of the goods or five thousand rupees) whichever is the greater;
- ii. in the case of dutiable goods, other than prohibited goods, to a penalty (not exceeding the duty sought to be evaded on such goods or five thousand rupees), whichever is the greater;
- iii. in the case of goods in respect of which the value stated in the entry made under this Act in the case of baggage, in the declaration made under section 77 (in either case hereafter in this section referred to as the declared value) is higher than the value thereof, to a penalty (not exceeding the difference between the declared value and the value thereof or five thousand rupees), whichever is the greater;
- iv. in the case of goods falling both under clauses (i) and (iii), to a penalty (not exceeding the value of the goods or the difference between the declared value and the value thereof or five thousand rupees), whichever is the highest;
- v. in the case of goods falling both under clauses (ii) and (iii), to a penalty (not exceeding the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or five thousand rupees), whichever is the highest.

Sri R. Raghunandan, learned Counsel for the petitioner, submits that for application of clause (b) of Section 112, the authority concerned has to be satisfied that the person, on whom penalty is to be imposed, knew or had reason to believe that the goods he was dealing with were liable for confiscation under Section 111. Learned Counsel would submit that in the absence of *mens rea* in this regard, the provisions of clause (b) of Section 112 are not attracted and therefore no penalty can be imposed on the petitioner. Learned Counsel places reliance on the judgment of the Supreme Court in **M/s.Pine Chemical Suppliers Vs. Collector of Customs**.

Sri A.Rajasekhar Reddy, learned Assistant Solicitor General places reliance on Section 129E of the Customs Act which relates to deposit pending appeal and reads thus:

“Deposit, pending appeal, of (duty and interest) demanded or penalty levied.

Where in any appeal under this Chapter, the decision or order appealed against relates to any (duty and interest) demanded in respect of goods which are not under the control of the customs authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal deposit with the proper officer the demanded or the penalty levied:

PROVIDED that where in any particular case, the (Commissioner (Appeals)) or the Appellate Tribunal is of opinion that the deposit of duty and interest demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue.

PROVIDED FURTHER that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty and interest demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so, decide such application within thirty days from the date of its filing”

Learned Counsel submits that it is only in case the penalty levied would cause undue hardship that the appellate Tribunal may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safeguard the interests of revenue.

Learned Counsel would submit that there is no plea of undue hardship either in the stay application filed by the petitioner before the 2nd respondent or in the affidavit filed in support of the writ petition and therefore the question of waiver of pre-deposit does not arise. Learned Counsel further contends that under Section 111(o) of the Customs Act, any goods exempted, subject to any condition, from duty under the Act or any other law for the time being in force, in respect of which the condition is not observed, unless the non-observance of the condition was sanctioned by the proper officer, is liable for confiscation and therefore the petitioner, is liable to be imposed penalty under Section 112(a) of the Customs Act.

In the petition filed under Section 35(F) of the Central Excise Act and Section 129(E) of the Customs Act, 1962, for waiver of duty and penalty, the petitioner categorically stated that insistence on pre-deposit of any part of the alleged duty demanded and penalty imposed would cause undue hardship and irreparable loss to him. In the affidavit, filed in support of the writ petition, also the petitioner has stated that refusal to waive pre-deposit of a huge sum of Rs.1.75 Crores was clearly a hardship caused to him and that the 2nd respondent had violated the guidelines set out in Section 129-E of the Customs Act. The submission of the learned Assistant Solicitor General that the petitioner has not pleaded undue hardship is, therefore, not tenable.

Both in the appeal filed before the 2nd respondent and in the affidavit filed in

support of the writ petition, the petitioner has reiterated that personal penalties could be imposed on individuals only if they concern themselves with the goods which are liable for confiscation and in the absence of mens rea or an attempt, on the part of the petitioner, to concern himself with goods, which are liable for confiscation under Section 111 of the Customs Act, imposition of personal penalty under Section 112 of the Customs Act was not warranted. Sri R.Raghunandan Rao, learned counsel for the petitioner, refers to several judgments in this regard, which we do not propose to burden this order with, since these are all matters required to be considered by the 2nd respondent in the appeal filed before it by the petitioner herein.

The only question which arises for consideration in this writ petition, is whether or not the 2nd respondent was justified in refusing to waive the requirement of pre-deposit of penalty imposed on the petitioner of Rs.1.75 Crores more so when the petitioner has pleaded undue hardship if he was required to make the said pre-deposit.

While exercising power conferred under the first proviso to Section 129E of the Customs Act, to dispense with pre-deposit, the 2nd respondent is required to consider the facts and circumstances of each case including factors, such as the quantum of amount required to be deposited, substantial questions of law, if any, raised in the appeal, undue hardship caused to the appellant on his being required to make such deposit, prejudice which may be caused to the interest of revenue if the requirement of pre-deposit is waived, etc,. The 2nd respondent has failed to examine the application filed by the petitioner having regard to the requirements under the first proviso to Section 129-E of the Customs Act.

While this Court, in exercise of its extra-ordinary jurisdiction under Article 226 of the Constitution of India, would normally have remanded the matter back to the 2nd respondent directing it to re-consider the application filed by the petitioner herein for waiver of deposit under Section 129E of the Customs Act, in the facts and circumstances of the present case, we are satisfied that the petitioner has raised substantial grounds, regarding the personal penalty imposed on him, which require examination by the 2nd respondent in the appeal filed before it and in such circumstances, pre-deposit of a huge sum of Rs.1.75 Crores imposed as personal penalty would cause undue hardship to the petitioner. Ends of justice would be met if the requirement of pre-deposit of the penalty amount of Rs.1.75 Crores, imposed

on the petitioner, is dispensed with and the 2nd respondent is directed to hear and dispose of the appeal filed by the petitioner within a specified period.

We accordingly direct the 2nd respondent, not to insist on pre-deposit of the penalty amount of Rs.1.75 Crores, to entertain and consider the appeal filed by the petitioner on merits and pass appropriate orders thereon, as expeditiously as possible, not later than three months from the date of receipt of a copy of this order.

The writ petition is accordingly disposed of. No order as to costs.

B. SUDERSHAN REDDY,J

Date: .08.2005

RAMESH RANGANATHAN,J

Asp/mrkr

